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PROTECTING THE RIGHT TO EMERGENCY MEDICAL SERVICE IN THE EUROPEAN COURT OF HUMAN RIGHTS AND COLLECTIVE COMPLAINT PROCEDURE

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ABSTRACT

The European Court of Human Rights (ECtHR) is generally described as the most effective human rights protection mechanism. While the jurisdiction of the Court is limited to civil and political rights, the protection of socio-economic rights at the Council of Europe is sought primarily through the Collective Complaint Procedure (CCP). Such a distinction reflects the traditional perception of human rights, according to which the protection of socio-economic rights has been regarded as inferior to first-category human rights. However, analysis of the ECtHR and CCP from the viewpoint of emergency medical service illustrates that, contrary to the prevailing understanding, both mechanisms do provide equally effective protection for claims concerning the right to emergency health care.

KEYWORDS

Collective Complaint Procedure, Emergency Medical Service, European Convention on Human Rights, European Court of Human Rights, European Social Charter, Human Rights

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INTRODUCTION

Human rights are the rights designed to safeguard the needs and purposes of human beings.[1] Traditionally civil and political rights, such as the right to life and prohibition of torture, have been distinguished from socio-economic rights because of the fact that the realization of the second-category rights has generally been regarded as demanding more contributions from the states, which is why civil and political rights are perceived superior to economic and social rights.[2] Such a conventional understanding of human rights is generally uphold by codifying these two sets of rights into two separate legal documents, like the Council of Europe (CoE) has done.

European Convention of Human Rights (ECHR),[3] and the European Court of Human Rights (ECtHR) related to it, is described as the most effective one from all existing human rights treaties worldwide. The success of the ECtHR relies heavily on the comprehensive case law it has created throughout the years. Nevertheless, not underestimating the achievements of the ECtHR, the jurisdiction of the Court is limited to examining simple the cases of alleged violations of civil and political rights covered by the ECHR and its protocols.[4] Socio-economic rights, on the other hand, are protected by the European Social Charter (the Charter).[5] The enforcement of these rights has been constructed upon the state reporting system and Collective Complaint Procedure (CCP).

However, the distinction between two human rights categories seems rather ambiguous in daily life. For example, in core human rights treaties the rights to health and health care are categorized as socio-economic rights,[6] despite the fact that they *de facto* put great emphasis on civil and political rights as well. This emphasis is particularly obvious in relation to emergency medical service (EMS) which, for instance, under Finnish law is defined as "urgent treatment of the patients who have suffered an injury or a sudden onset of an illness outside the

[1] Tanel Kerikmäe and Katrin Nyman-Metcalf, "Less is More or More is More? Revisiting Universality of Human Rights," *International and Comparative Law Review* 12 (2012): 44; Tanel Kerikmäe, Ondrej Hamulak, and Archil Chochia, "A Historical Study of Contemporary Human Rights: Deviation or Extinction?" *Acta Baltica Historiae et Philosophiae Scientiarum* 4 (2016): 99.
[2] Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Practice and Morals* (New York: Oxford University Press, 2008), 263; Klaus Fusch, "The European Social Charter: Its Role in Present-Day Europe and its Reforms": 151; in: Krzysztof Drzwicki, Catarina Krause, Alan Rosas, eds., *Social Rights as Human Rights: A European Challenge* (Turku: Åbo Akademi University Institute for Human Rights, 1994).
[3] Officially named *as Convention for the Protection of Human Rights and Fundamental Freedoms* (1950, CETS No. 005).
[4] *The ECHR,* art. 32.
[5] *European Social Charter*, originally adopted in 1961 (CETS No. 035) and revised in 1996 (CETS No. 163).
[6] For example*, the revised European Social Charter* (1996), art. 11 and 13; *the International Covenant of Economic, Social and Cultural Rights* (1966), art. 12.

health care treatment facilities, and transportation of the patient to the treatment unit with the most appropriate medical service."[7] Therefore, responding to the most urgent and severe threats to health, the EMS system has essentially been created to safeguard the inherent human right to life, hence potentially challenging the conventional understanding of human rights categories.

It should be noted that discussion on health care related human rights as such is not unprecedented; quite to the contrary. Scholarly views have been presented *inter alia* on the right to health and health care in general, or on specific health questions, such as maternal care or protection against infectious diseases.[8] However, no separate or comprehensive legal focus on EMS has been given. For example, the United Nation's commentary on the right to health, which is generally considered as the most valued document in this context, describes the very minimum level of health care that is expected from states, including for example nutrition, vaccinations and attainable health services, but even such a commentary fails to recognize the role of EMS in relation to most urgent health care.[9] Thus, EMS is important from a human rights perspective not only because of its close connection to the right to life as the first step of the medical care in the most urgent situations and possible fatal consequences of the failure to guarantee the service, but also – and precisely – because EMS has so long been overlooked as being a human right.

This article evaluates how the right to EMS can be claimed and enforced under the human rights protection mechanisms of the CoE (namely ECtHR and CCP) and what the potential faults of those mechanisms in this regard are. The analysis focuses on two types of claim which, for the purpose of the article, are identified as general and individual. A general claim is one in which the violation is alleged to exist because of the ineffectiveness (i.e. faults) of the prevailing system but no actual incident has occurred to an individual yet. An individual claim, conversely, derives from the violation of the rights of one or more individuals. Essentially, the article argues that, contrary to the prevailing understanding, both enforcement mechanisms do provide equally effective protection for health care related claims.

In this context *effectiveness* is evaluated primarily by comparing these two enforcement mechanisms in order to determine which one would offer better

[7] *Health Care Act* (*Terveydenhuoltolaki*, 1326/2011), art. 40(1).
[8] See, for example, Colin Mc Innes and Kelly Lee, "Health, Security and Foreign Policy", *Review of International Studies* 32 (2006); Brigit Toebes, "The Right to Health"; in: Alan Rosas, Catarina Krause, and Asbjorn Eide, eds., *Economic, Social and Cultural Rights: a Textbook* (Dordrecht: Martinus Nijhoff, 2001); Jonas Juskevicius and Janina Balsienė, "Human Rights in Health Care: Some Remarks on the Limits of the Right to Health Care," *Jurisprudentia* 4 (2010); Alicia Ely Yamin, "Toward Transformative Accountability: Applying a Rights-based Approach to Fulfill Maternal Health Obligations," *International Journal on Human Rights* 7 (2010).
[9] United Nation's Committee on Economic, Social and Cultural Rights (CESCR), "General Comment no. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)" (2000, E/C.12/2000/4).

grounds for successful claim concerning EMS. The leading (and rather optimistic) assumption is that states are willing to comply with and draw inspirations from decisions of these human rights monitoring bodies. When cases concerning EMS have not been discussed or challenged, states are more prone to perceive EMS as a political or economic question rather than a human right.[10] However, when EMS is acknowledged to belong among protected human rights, more consideration to this right will be given at the national level because the question of functioning EMS system is no longer merely an internal political or economic matter but has an international importance on how other states perceive one's human rights situation, and can therefore also affect international relations. *Effectiveness* in relation to EMS system, on the other hand, refers to all aspects which, if not working properly, could compromise EMS and result actual or foreseeable loss of lives.

The article consists of five parts. Following the introduction, the second part of the article analyses the right to EMS from the perspective of the Charter and the CCP as its protection mechanism. The third part introduces the relevant ECHR articles and the ECtHR case law which could be applied in submitting the claim concerning the right to EMS to the Court. Part four compares the protection mechanisms of the Charter and the ECHR and evaluates their effectiveness in relation to the right to EMS. Finally, the fifth part summarizes and concludes the article.

1. THE RIGHT TO EMS CAN BE DETECTED FROM THE EUROPEAN SOCIAL CHARTER

1.1 THE NATURE AND THE SCOPE OF THE CHARTER INCLUDES EMS

The original Charter was established in 1961.[11] However, acknowledging the developments of economic and social rights, including increased equality between men and women over the years, the Charter was revised in 1996 to provide a better protection on socio-economic needs for the population of the CoE member states.[12] In fact, the Charter represents the genuine nature of the socio-economic

[10] For example, a parliamentary ombudsman of Finland issued a decision in 2015 according to which the equal access to EMS was compromised in Finland due to the dead zones in Emergency Medical Service Helicopters' (HEMS) operational areas. Despite the constitutional references in the decision the Ministry of Social Welfare and Health was in spring 2018 still in an opinion that the question of new HEMS basis is merely a political and economic question. *Decision of Parliamentary Ombudsman* (2015, Dnro 1989/4/14); Sosiaali- ja terveysministeriö, *Työryhmä Selvittää Lääkärihelikopterien Uusien Tukikohtien Sijoituspaikkakunnat* (2018, Briefing 58/2018) (Ministry of Social Welfare and Health, Working Group Established to Determine the Geographical Bases for New HEMSs).
[11] *European Social Charter* (1961, CETS No 035).
[12] Council of Europe, *Explanatory Report to the revised European Social Charter* (Strasburg, 1996), 7.

human rights by providing the goals to be achieved by the states rather than strict measures on how to comply with the rights set out in the text.[13]

Contrary to conventional treaties, the Charter has a unique layout providing a general statement of rights and principles in Part I, which summarizes the articles of the Charter and appear as declaratory political aims for the states.[14] Legally binding articles are introduced in Part II. However, to offer the states some autonomy by not imposing too heavy a burden on them, and thereby tempting more states to adopt the Charter, part III allows the participants of the Charter to choose the articles to which they consider themselves bound. The selection cannot be haphazard, but needs to be done according to the common principles.[15]

The protection of health and health care is codified primarily in articles 11 and 13. Article 11 obliges the states to ensure the effective exercise of the right to protection of health by undertaking appropriate measures. More specifically, the obligation refers to the removal of causes of ill-health (art. 11(1)), offering advisory and educational facilities for the promotion of health (art. 11(2)) and the prevention of epidemic, endemic and other diseases as well as accidents (art. 11(3)). According to the general obligation set forth in the article, the measures to protect health can be taken either directly by the state or in cooperation with the public or private organizations.

Article 13 is dedicated to the right to social and medical assistance. The first paragraph (art. 13(1)) requires the states to ensure a person to be granted adequate assistance when that person is without adequate resources and is unable to secure such resources. The social security scheme and cases of sickness are particularly mentioned in article. Article 13(2) appears, for its part, to strengthen the general non-discrimination clause of the Charter by obliging the state to ensure that the political and social rights of the person receiving the assistance described in article 13(1) shall not be diminished.[16] The right to receive personal help required to prevent, remove or alleviate personal or family want is secured in article 13(3).

Although the Charter imposes great demand on the states' economic resources,[17] the circumspect wording of articles 11 and 13 reflects the nature of the socio-economic human rights being subjected to the progressive realization and

[13] *European Social Charter (revised*) (1996, CETS No 163), Preamble.
[14] *Explanatory Report to the revised Charter*, *supra* note 12, 12, 121.
[15] *European Social Charter* (*revised),* Part III, art. A(1)(b) requires the states be bound by at least six of the following articles of Part II of the Charter: 1, 5, 6, 7, 12, 13, 16,19, 20; Art. A(1)(b) requires the state to be bound by additional number of articles or numbered paragraphs of Part II of the Charter, the total number of articles being sixteen or total number of paragraphs being sixty-three.
[16] *European Social Charter (revised*), Part V, Article E.
[17] David Harris, "The Council of Europe (II): the European Social Charter": 313; in: Raija Hanski and Markku Suksi, eds., *An Introduction to the International protection of Human Rights: A Textbook* (Turku: Institute for Human Rights, Åbo Academy, 2000).

thereby provides the states wide autonomy to choose the proper methods to meet their obligations.[18] For example, to ensure the availability of the appropriate personal help required under article 13(3), EMS can be provided by state-operated units or by private EMS entrepreneurs. Simultaneously, states define the specific details such as the locations of EMS units or professional qualifications required from ambulance crew. Although the Charter provisions seem more of guidelines, certain common standards can be found nevertheless. For example, compliance with article 11(1) requires the state to provide evidence that a satisfactory and generally accessible adequate medical and health infrastructure exists and proper medical care for the whole community without unnecessary delays or unbearable costs for the patients is provided.[19] Article 13(3), on the other hand, has been perceived to refer mainly to social welfare schemes,[20] despite the notion of 'medical assistance' being equally applicable to health care and EMS as well. Therefore, the broad and ambiguous wording of articles 11 and 13 allows various health related issues to fall within the scope of the Charter.

1.2. APPLICATION AND ENFORCEMENT OF THE RIGHT TO EMS IN THE CHARTER IS DONE PRIMARILY THROUGH COLLECTIVE COMPLAINT PROCEDURE

Although the Charter is also enforced through the state reporting system,[21] more intriguing case law emerges from the collective complaint procedure (CCP). Contrary to the somewhat subjective reports which states themselves submit concerning the application of the Charter provisions to which they considered themselves bound, collective complaints are launched by the particular applicants claiming state's non-compliance with the Charter provision in regard to a specific situation.

The European Committee of Social Rights (the Committee), which prior to 1998 was called the Committee of Independent Experts, is the main body interpreting the Charter in relation to the collective complaints.[22] As the Protocol on collective complaints came into force in 1998, the Committee has drawn up

[18] Oliver De Shutter, "The European Social Charter": 477; in: Catarina Krause and Martin Scheinin, eds., *International Protection of Human Rights: A Textbook* (Turku: Åbo Academy University Institute for Human Rights, 2012).
[19] European Committee of Social Rights, *European Social Charter (revised): Conclusions 2009 –volume 1,* (Strasbourg: Council of Europe Publications, 2010), 26-29; Donna Gouien, David Harris, amd Leo Zwaak, *Law and Practice of the European Convention on Human Rights and European Social Charter (*Strasbourg: Council of European Publishing, 1996), 397-398.
[20] Council of Europe, *Social Protection in the European Social Charter: Social Charter monographs – No 7,* (Strasbourg: Council of Europe Publications, 2000), 102-104.
[21] *European Social Charter (revised)*, Part VI, art. 21.
[22] *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (1995, CETS No. 158), art. 7-8 [hereafter referred to as "CCP Protocol"].

numerous reports which it has then submitted to the Committee of the Ministers to be adopted as resolutions.[23] Considering the extensive scope of the socio-economic rights covered by the Charter, it seems unsurprising that the cases submitted to the Committee vary from work-related matters to social security issues and to situations concerning environmental health.[24]

The Committee has also evaluated a rather limited number of cases in relation to health care under articles 11(1) and 13(3) of the Charter especially, recognizing health care as a prerequisite for the preservation of human dignity.[25] In addition to couple of cases concerning abortion practices,[26] the most cases regarding articles 11(1) and 13(3) have been lodged to protect the rights of illegal immigrants, asylum seekers or certain minority groups. For example, *FIDH v. France* concerned the illegal immigrants' right to health care under article 13(3).[27] Simultaneously, the applicants in *DCI v. Belgium* claimed that Belgium violated the right of the foreign minors unlawfully within the territory or seeking asylum to health care *inter alia* under articles 11(1) and 13(3).[28] *Medecins du Monde – International v. France,* on the other hand, dealt with the right to protection of health and the right to medical assistance for Roma people migrating from Romania and Bulgaria.[29]

Closely related to the EMS, the Committee has stated that all foreign nationals have the right at any time to obtain treatment for emergencies and life-threatening conditions.[30] Such an acknowledgement is in fact well implemented in national laws.[31] However, no case directly claiming state's incompatibility with the Charter to guarantee the right to EMS *per se* has been filed or decided, although the Charter provides various opportunities to construct such a claim. For example, removal of ambulances from sparsely populated areas or a reduction in the number of ambulances in densely populated regions can amount to violation of article 11(1). Large coverage areas and simultaneous missions result in long time intervals from dispatch to scene which can rapidly become fatal in the case of cardiac arrest if medical resuscitation is not started within a sufficient time frame.[32] In such

[23] *Ibid*, art. 9; Oliver De Shutter, *supra* note 18, 471.
[24] *European Council of Police Trade Unions (CESP) v. France*, European Committee of Social Rights (2002, complaint no 68/2001); *Union Syndicale des Magistrats Administratifs (USMA) v. France* (2013, complaint no 84/2012); *Finnish Society of Social Rights v. Finland* (2014, complaint no 88/2012); *International Federation of Human Rights Leagues (IFHR) v. Ireland* (2008, complaint no 42/2007); *MFHR v. Greece* (2006, complaint no 30/2005); *FIDH v. Greece* (2013, complaint no 72/2011).
[25] *FIDH v. France* (2004, complaint no 14/2003).
[26] *Federation of Catholic Families in Europe (FAFCE) v. Sweden* (2015, complaint no 99/2013). *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy* (2015, complaint no. 91/2013).
[27] *FIDH v. France*, *supra* note 25.
[28] *Defence for Children International (DCI) v. Belgium* (2012, complaint no 69/2011).
[29] *Medecins du Monde – International v. France* (2012, complaint no 67/2011).
[30] *FIDH v. France, supra* note 25, 25.
[31] See, for example, *Terveydenhuoltolaki* (1326/2010, Health Care Act [of Finland]), art. 50; *Tervishoiuteenuste korraldamise seadus* (RT I 2001, 50, 284, Health Service Organisation Act [of Estonia]), art. 6.
[32] G. D. Perkins et al., "European Resuscitation Council Guidelines for Resuscitation 2015: Adult Basic Life Support and Automated External Defibrillation," *Resucitation* 95 (2015): 83.

situations, the state is failing its obligation to take appropriate measures to remove the causes of ill-health as far as possible as, by reducing the number of ambulances, state has *de facto* adopted measures contrary to article 11(1).

However, an effective and adequately functioning EMS system (i.e. a system that responds without undue time intervals) cannot be evaluated simply based on the statistics on how quickly ambulance reaches patient. In conjunction with article 11(1), article 13(3) can also be invoked to challenge state's actions, political decisions and guidelines on EMS. Whereas article 11(1) unquestionably refers to the obligation of state, article 13(3) grants the right to receive appropriate personal help required to prevent, remove or alleviate personal want directly. Thus, to be able to resuscitate patient according to the valid medical guidelines ambulance crew needs to be professionally trained and have access and knowledge to use functioning medical equipment such as a defibrillator properly. Furthermore, in conjunction with articles 11(1) and 13(3) of the Charter being most appropriate in protecting the right to EMS, the general principle of non-discrimination shall not be disregarded. Codified in Part V article E of the revised Charter and thus forming a counterpart to article 14 of the ECHR,[33] the non-discrimination provision safeguards the enjoyment of the rights covered by the Charter by prohibiting discrimination without objective and reasonable justification on any grounds including social origin, health, religion or sex.[34] Therefore, in addition to the number and locations of the ambulances, the complaint on failure to provide an adequate EMS system can also emerge, for example, as a result of insufficient educational schemes, lack of properly functioning medical devices or the policy decisions applied in some discriminatory manner such as the guidelines preventing paramedics treating patients who live in social care facilities.

1.3. CHALLENGES ON LODGING THE COMPLAINT ARE MAINLY CAUSED BY STATES

The enforcement mechanism of the first Charter of 1961 was constructed solely upon the state reporting system excluding the opportunity for individuals to challenge states for non-compliance with the Charter.[35] Largely because of the rather insufficient protection offered by the original Charter, the CoE introduced a new way of enforcing the socio-economic rights through the CCP Protocol in 1995.

[33] *Explanatory report to the Revised European Social Charter*, *supra* note 12, 136-137
[34] According to the Part V article E discrimination is prohibited on any grounds such as race, color, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status. However, the term 'such as' indicates the list not to be exhaustive; *Explanatory report to the revised Charter*, *supra* note 12, 136.
[35] Oliver De Shutter, *supra* note 18: 463; *The European Social Charter* (1961), part IV.

Thus, the inherent aim of the new procedure was to increase the efficiency of the supervisory mechanism.[36]

Although the adoption of the CCP has indisputably enhanced the protection of the rights covered by the Charter, the successful utilization of the procedure is open to some challenges. Firstly, the ratification of the protocol is required as a precondition for application of the procedure following the rules of general treaty law.[37] In August 2018, only fifteen states had accepted the protocol,[38] whereas number of the state parties to the Charter was thirty-four.[39] Secondly, while the Charter provides states with a certain freedom to choose the rights which they consider binding, the collective complaint can merely be filed against an article or provision of the Charter which state has accepted.[40] Thus, despite the noble aim of enhancing the protection through the Protocol, application of the CCP is inherently dependent on the willingness of state to provide such a supervisory mechanism over socio-economic rights. Willingness or lack thereof, on the other hand, can be seen to reflect state's perception and understanding of the overall importance of social and economic rights.

Considering that the state has ratified the Protocol and accepted being bound by articles 11(1) and 13(3) of the Charter, the Protocol imposes additional preconditions for the viability of the complaint. As the name of the procedure suggests, in order to be regarded as collective, a complaint cannot be lodged by an individual *per se*. Therefore, according to article 1 of the Protocol only complaints from pre-specified international non-governmental organizations (NGOs) or from certain limited organizations representing employers or employees are accepted. However, article 2(1) of the Protocol allows state to recognize by declaration the right of any other representative national NGO within its jurisdiction to lodge the complaint, providing that NGO has a particular competence in the matter governed by the Charter. Sadly, Finland appears to be the only state acknowledging this competence.[41]

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[36] Council of Europe, *Explanatory Report to Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (Strasbourg, 1995), 2.
[37] *European Social Charter (revised),* Part IV, art D(1).
[38] Countries that have ratified the Protocol are Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden; Council of Europe, "Chart of Signatures and ratifications of the convention no 158" (6 August 2018) // http://www.the CoE.int/en/web/conventions/full-list/-/conventions/treaty/158/signatures?p_auth=gV2pnvym.
[39] Council of Europe, "Chart of signatures and ratifications of the convention no 163" (6 August 2018) // http://www.the CoE.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures?p_auth=1zaCooN0.
[40] *CCP Protocol*, art. 4.
[41] Council of Europe, "Reservations and Declarations relating to the 1995 Protocol Providing a System of Collective Complaints" (6 August 2018) // https://rm.the CoE.int/The CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048b059.

Furthermore, for the complaint to meet the requirement of collectiveness, individual situations cannot be addressed as such.[42] However, the rule should not be interpreted too strictly as a complaint arising from individual situation may proceed successfully if situation can be generalized.[43] The failure of an ambulance to reach one patient within a reasonable time thus can be regarded as collective in nature if the failure occurred because of state's inability to provide a sufficient number of EMS units in close proximity to the population to respond the needs of individuals. Simultaneously, unsuccessful resuscitation that originates from insufficient training can have an impact on a number of patients. On the other hand, as the complaint shall establish state's failure to ensure the satisfactory application of the provision of the Charter,[44] unlike claims submitted to the ECtHR, the collective complaint is not dependent on the incidents occurring but can *de facto* be lodged based, for example, on merely political decisions to reduce the number of ambulances, deteriorate educational facilities or not to provide properly functioning medical equipment, if non-compliance with articles 11(1) and 13(3) is foreseeable.

Based on admissibility, the CCP offers flexible ways of lodging a complaint on the right to EMS. Considering that the state has ratified the CCP Protocol and accepted the binding force of articles 11(1) and 13(3) of the Charter, general claims challenging the overall effectiveness of the prevailing EMS system should be proceed successfully when lodged by eligible organization. Claims on failure to help one patient can also succeed if the failure is regarded as having wider importance. However, the ineffectiveness of the procedure relies heavily on the states' perception of the importance of social and economic rights.

2. THE RIGHT TO EMS CAN BE INTERPRETED ALSO IN THE ECHR

2.1. THE SCOPE AND NATURE OF THE ECHR TO NOT EXPLICITLY CONFER SOCIO-ECONOMIC RIGHTS

The ECHR has been described as one of the greatest and most important achievements of the CoE providing a major contribution to human rights law at regional and global levels.[45] In fact, considering that the ECHR was established as early as 1950, it is the first legally binding document implementing the common

[42] *Explanatory report to the 1995 Protocol*, *supra* note 36, 31.
[43] Robin R. Churchill and Urfan Khaliq, "The Collective Complaints System of the European Social Charter: an Effective Mechanism for Ensuring Compliance with Economic and Social Rights?" *European Journal of International Law* 15 (2004): 432.
[44] *CCP Protocol*, art. 4.
[45] Malcom N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2012), 347; Ralph Beddard, *Human Rights and Europe* (Cambridge: Cambridge Grotius Publications, 1993), 1.

standards of human rights set out in the Universal Declaration of Human Rights merely two years earlier.[46] The significance of the ECHR is complemented further by its extensive geographical scope, as forty-seven European and former Soviet states altogether have ratified the Convention.[47] Furthermore, since the 1980s states wishing to join to the CoE have been required to accept and ratify the Convention.[48] Similarly, acceptance of and adherence to the ECHR is acknowledged as an obligatory condition of European Union membership which, in itself, reflects the high recognition of the values and principles codified in the Convention.[49] Moreover, in addition to the fact that the Convention and its fourteen protocols form an extensive list of civil and political rights, the significance of the ECHR is further enhanced by the exceptional enforcement mechanism as the provisions concerning the Court (ECtHR) had already been codified in the ECHR thereby making the jurisdiction of the ECtHR binding upon all the states ratifying the Convention.

The obligation of the state to safeguard the civil and political rights under the ECHR is applicable to all human beings irrespective of the conditions such as the conduct of an individual, citizenship or legal basis of residence, thereby reflecting the universal, indivisible, indispensable and inalienable nature of human rights.[50] Furthermore, the state is not only required to refrain from interference with the rights and freedoms of individuals but also demanded to take appropriate steps to protect such rights and to prevent other individuals from violating them.[51] Additionally, as time of emergency, article 15(1) allows state to make measures derogating from its obligations under the ECHR, article 15(2) specifies the rights that cannot be derogated in any circumstances. Therefore such rights, including article 2 protecting the right to life and article 3 concerning the prohibition of torture, are regarded as hard-core human rights of essential importance.[52]

[46] Rick Lawson, "The European Convention on Human Rights": 423; in: Catarina Krause and Martin Scheinin, eds., *International Protection of Human Rights: A Textbook* (Turku: Åbo Academy Institute for Human Rights, 2012).
[47] Council of Europe, "Chart of signatures and ratifications of the convention 005" (6 August 2018) // http://www.the CoE.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=IHX23mQ7.
[48] Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights* (New York: Oxford University Press, 2007), 13.
[49] Francis G. Jacobs, *The Sovereignity of Law: the European Way* (Cambridge: Cambridge University Press, 2007), 23; Vaughne Miller, "Is Adherence to the European Convention on Human Rights a Condition of European Union Membership?" *Standard Note* SN/IA/6577 (March 25, 2014): 7.
[50] *Soering v. UK*, European Court of Human Rights (1989, 11 EHRR 439).
[51] *Association X v. UK* (1978, 14 DR 31), 32.
[52] Loukis G. Loucaides, "Restrictions or limitations on the Rights Guaranteed by the European Convention on Human Rights": 338; in: Martti Koskenniemi, et al., eds., *Finnish Yearbook of International Law IV* (Helsinki: Ius Gentium Association, 1993).

Moreover, derogations are designed to be temporary solutions to extraordinary situations, thus making permanent derogations incompatible with the Convention.[53]

Although the ECHR consists of the rights and freedoms that are regarded essential as for political democracy and rule of law, the Convention offers states the possibility to make reservations in respect of any particular provision of the Convention.[54] However, unlike the Charter explicitly providing the possibility to exclude certain provisions, the ECHR has adopted the perception whereby states should considered themselves bound by the Convention as a whole making the reservations exceptions. Furthermore, the fact that article 57(1) of the ECHR does not exclude any rights from reservations appears rather controversial in relation to the preamble and article 15(2) both recognizing and securing the inherent characters of human rights. Therefore, despite the wording of the article 57(1), the general treaty law prohibits any reservation which is incompatible with the object and the purpose of the treaty can be invoked to challenge the possible reservations made to articles 2 and 3 under the ECHR.[55]

In essence, the fundamental value of the ECHR relies on its binding nature to oblige states to protect the most fundamental civil and political rights. However, despite the fact that health care is generally categorized as a socio-economic right, it does not appear infeasible to apply the ECHR and its protection mechanism to protect the right to EMS as well.

2.2. APPLICATION AND ENFORCEMENT OF THE RIGHT TO EMS CAN BE FOUND IN THE ECHR

The wording of the ECHR does not provide direct references to health care or the EMS *per se*. However, the ECtHR has issued judgements involving the health-related matters such as mental illness or the medical condition of the applicant.[56] Furthermore, bearing in the mind the inherent nature of EMS providing urgent treatment for injuries or sudden illnesses, applicable protection of the ECHR in relation to the right to EMS is based on articles 2 and 3 especially. Simultaneously, the importance of article 8 protecting the right to respect for private and family life shall not be overlooked.[57] However, a comprehensive overview of relevant articles

[53] Fionnuala Ni Aolain, "Transitional Emergency Jurisprudence: Derogation and Transition": 30; in: Antoine Buyse and Michael Hamilton, eds., *Transitional Jurisprudence and the ECHR: Justice, Politics and Right*s (Cambridge: Cambridge University Press, Cambridge, 2011).
[54] *The ECHR*, art. 57(1).
[55] *Vienna Convention on Law of the Treaties* (1969), art. 19(1)(c).
[56] See, for example, *Gard and Others v. United Kingdom* (2017, application no. 39793/17); *Keenan v. United Kingdom* (2001, 33 EHR 38); *D v. United Kingdom* (1997, 24 EHRR 423).
[57] Article 14 prohibiting discrimination is simultaneously applicable to any rights covered by the ECHR. However, as this article is invoked to supplement the rights set out in other articles of the ECHR the extensive analysis of article 14 is excluded from this article; Furthermore, Protocol 12 of the ECHR

is needed in order to fully recognize the relationship of the ECHR and the right to EMS.

It should also be noted that while many of the cases presented below have been litigated over decade(s) ago and have received wide discussions in academic literature, their applicability to EMS has not been analysed yet. Furthermore, these cases have introduced numerous legal interpretations that are still valid and can be applied to defend the right to EMS in the ECtHR. Therefore, even though newer case law is also presented, the older judgments and legal principles enshrining from them illustrate that grounds for protecting EMS have already existed for years. These older cases cannot thus be regarded as outdated in the present analysis.

2.2.1. ARTICLE 2 AND THE RIGHT TO EMS ARE CLOSELY INTERCONNECTED

Article 2 of the ECHR consists of two paragraphs. Whereas the first paragraph announces that everyone's right to life shall be protected by the law, paragraph two lists three exceptions deriving from the necessary use of force. Largely based on the wording of article 2(2) in particular, the ECtHR has in fact issued numerous judgements concerning the disproportionate use of force, unlawful killings and ineffective investigations of deaths.[58] However, the ECtHR has also determined cases concerning *inter alia* abortion, right to die and the conditions of the detainees ultimately leading to death, not simply state's obligation to safeguard the right to life against violent acts.[59]

Despite the fact that the right to EMS as such has not yet been defended in the ECtHR,[60] the general doctrines from the comprehensive case law concerning the interpretation of the right to life are applicable to EMS as well. For example, the Court stated in *McCann* that the state is under the positive obligation to take steps to prevent the avoidable loss of life,[61] which in relation to EMS, means state's obligation to provide and maintain an effective EMS system that is actually capable of responding to life-threatening medical conditions without undue delays and with professionally trained ambulance crew. The obligation to safeguard life by providing adequate medical assistance, however, can be justified, for example, by the ruling

introducing non-discrimination as an autonomous right has not received general acceptance as the number of states ratifying the Protocol in August 2018 was 20.

[58] *Ioniță v. Romania* (2017, application no. 81270/12); *McCann and others v. United Kingdom* (1995, 21 EHRR 97); *Ergi v. Turkey* (2001, 32 EHRR 18); *Mahmut Kaya v. Turkey* (2000, ECHR 129).

[59] *Vo v. France*, ECtHR (2005, 40 EHRR 12); *Tysiac v. Poland* (2007, 45 EHRR 42); *Pretty v. United Kingdom* (2002, the ECHR 427); *Mojsiejew v. Poland*, ECtHR (2009, Application no 11818/02).

[60] In a case *Fudrik v. Slovakia* (2008, Application no. 42994/05) the applicant sought to challenge the Slovakian legal framework on Emergency Services because of his daughter's death in mountaineering accident but the Court did not find the existed Slovakian legal framework insufficient in the context and ruled the case to be inadmissible.

[61] *McCann v. UK*, *supra* note 58, 151.

in *LBC v. UK* where exposure to nuclear tests had caused leukemia.[62] Furthermore, in *Osman v. UK* the Court held that a real and immediate threat to life required reasonable measures from state.[63]

Whereas *McCann* and *LBC* can be invoked to justify the obligation of state to provide a functioning EMS system, *Osman* provides grounds for individual claim. Originally referring to real and immediate threat to an identifiable person in relation to criminal actions, the ruling could nevertheless be applied to situations such as that in which ambulance crew knew that patient had a coronary heart disease but failed to take an electrocardiogram film (ECG) although patient complained of chest pain during EMS mission.[64] Moreover, the ECtHR judgements concerning state obligation to safeguard the right to life against violent actions of individual are, in relation to EMS, applicable to cases of mentally ill person posing a threat to his own life or lives of other individuals, i.e., a threat to public safety. According to the ECtHR, such a person can be placed in a mental hospital against his will as a preventative measure.[65] Although not every mentally ill person poses a threat to life or requires ambulance as the first medical unit, in the most severe cases the failure to provide EMS unit with properly trained medical staff to respond to situation can exacerbate the avoidable loss of life.

Furthermore, in addition to somewhat traditional right to life cases concerning *inter alia* the use of force or medical treatments such as abortion, the ECtHR has applied article 2 to the environmental issues as well. For example, in *Öneryildiz v. Turkey* the Court ruled that Turkey was in violation of article 2 by failing to act to prevent the methane exploding in a waste dump near to a slum quarter despite the known risk.[66] In *Budayeva and others v. Russia* the breach was found due to the state's failure to take measures to prevent a known risk of mudslides although the ECtHR recognized the wide margin of appreciation of the state especially in cases of natural disasters when an impossible or disproportionate burden is imposed on the authorities.[67]

Öneryildiz and *Budayeva* provide three significant notions in relation to EMS. Firstly, as both cases involved situations in which the authorities knew or ought to have known the identified risk to life but failed to adopt appropriate measures, the circumstances are comparable to measures where number of ambulances is reduced in highly-populated areas despite statistical risk analysis defending actual

[62] *LBC v. United Kingdom* (1998, 27 EHRR 212).
[63] *Osman v. United Kingdom* (1998, EHRR 245).
[64] Marco Roffi, et al., "2015 ECG Guidelines for the management of acute coronary syndromes in patients presenting without persistent ST-segment evaluation," *European Heart Journal* 37 (2015): 274.
[65] *Storck v. Germany* (2005, application no 61603/00), 105; *Winterwerp v. the Netherlands* (1979, 2 EHRR 387), 39.
[66] *Öneryildiz v. Turkey* (2005, 41 EHRR 20).
[67] *Budayeva and others v. Russia* (2008, application no 15339/02).

need for units. Secondly, unlike natural disasters, EMS cannot be regarded as *force majeure* imposing an unbearable burden on state, as the need for functioning health care system is widely recognized through known and common causes of ill-health and diseases. Furthermore, practically every state bound by the ECHR is also obliged to take appropriate measures to ensure the enjoyment of the right to health and health care either under the European Social Charter or widely-ratified UN instrument protecting socio-economic rights.[68] Finally, the fact that the ECtHR has expanded its scope on interpretation of article 2 to environmental issues in addition to the traditional cases offers greater possibility for claims concerning the right to EMS to succeed. However, the right to life is not the only right under the ECHR that could be applied to EMS but the potential of articles 3 and 8 should also be recognized.

2.2.2. ARTICLE 3 CONFERS GREAT IMPORTANCE UPON THE RIGHT TO EMS

The wording of article 3 is unambiguous, stating that no one shall be subjected to torture or inhumane or degrading treatment or punishment. Providing no exception, the absolute nature of article 3 is therefore regarded as representing the most fundamental values in democratic societies making no derogation permissible even in the event of public emergency threatening the existence of nation.[69]

Degrading treatment as the mildest of the prohibited actions is defined by the ECtHR as arising in a victim's feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it drives the victim to act against his will or conscience.[70] Inhumane treatment amounts *inter alia* to premeditation, application for hours, causing actual bodily injury or intense physical and mental suffering.[71] Finally, torture is found in the most severe cases where deliberately inhumane treatment causes very serious and cruel suffering.[72]

In fact, article 3 has been applied to a limited number of the health related cases.[73] For example, emphasizing the exceptional circumstances of the case in *D v. UK*, the ECtHR held that the deportation of the person suffering the terminal stage of the AIDS to a country with poor medical facilities amounted to a breach of

[68] *International Covenant on Economic, Social and Cultural Rights* (1966), *supra* note 6.
[69] *Chahal v. United Kingdom* (1997, 23 EHRR 413), 79-80.
[70] *Tyrer v. United Kingdom* (1978, 2 EHRR 1), 30.
[71] *Jalloh v. Germany* (2006, the ECHR 721), 68-83.
[72] *Aksoy v. Turkey* (1996, 23 EHRR 553), 63.
[73] For example, *Keenan v. United Kingdom*, *supra* note 56, and *Herczegfavly v. Austria* (1993, 15 EHRR 437) in relation to treatment of mentally ill patients.

article 3 by subjecting the person to inhumane treatment.[74] Similarly, imposing a chronically ill detainee to passive smoking constituted a violation of article 3 in *Elefteriadis v. Romania*.[75] On the other hand, in *Pretty v. UK,* the Court did not accept the claim of the woman paralyzed by degenerative and terminal illness invoking the positive obligation of the state to protect her against the degrading treatment which would result if she could not commit assisted suicide.[76]

In addition to cases directly concerned with medical issues, the general cases clarifying the interpretation of article 3 provide significant grounds for the right to EMS as well. Whereas long-term physical abuse and mental distress have been interpreted to amount to torture, a forcible change of haircut has been regarded as degrading because of humiliation and immediate visibility.[77] Although the level of severity is determined on a case-by-case basis, considering the brutality of action required to amount to torture, it appears relatively challenging to imagine such situations occurring in relation to EMS. However, acknowledging that inhumane or degrading treatment does not need to cause long-term injuries,[78] a breach of article 3 may derive, for example, from situations in which intravenous infusion is misplaced and drug is delivered to muscle instead of blood vessel. Simultaneously, in some cases merely inappropriate and humiliating treatment of patient by paramedic on racial grounds may be regarded as degrading. Furthermore, disregarding the wishes of patient not to be treated with analgesic medication, for example, would constitute degrading treatment under article 3 as well as interference with personal autonomy secured by article 8.

Similarly to all rights covered in the ECHR, the state has a positive obligation to secure the enjoyment of article 3, an obligation not expanded by the fact that ill-treatment is carried out by private individuals.[79] Since the obligation is especially emphasized in cases where authorities are aware or ought to be aware of the misconduct,[80] the state is obliged to ensure that ambulance crew is aware of the guidelines of cardiopulmonary resuscitation (CPR) and during the action have a proper understanding of circumstances affecting treatment, including patient's age, health, life expectancy and duration of lifelessness prior to the medical intervention, to take an example. Despite the attempt to secure the right to life, extensively prolonged or misapplied resuscitation may be considered as futile, and may expose

[74] *D v. United Kingdom, supra* note 56; Klaus Kapuy, Danny Pieters, and Bernhard Zaglmayer, *Social Security Cases in Europe: the European Court of Human Rights* (Antwer – Oxford – Portland: Intersentia, 2007), xx.
[75] *Elefteriadis v. Romania (*2011, application no. 38427/05).
[76] *Pretty v. United Kingdom*, *supra* note 58.
[77] *Selmouni v. France* (2000, 29 EHRR 403); *Yankov v. Bulgaria* (2005, 40 EHRR 36), 112.
[78] *Tomasi v. France* (1993, 15 EHRR 1).
[79] *Moldovan and others v. Romania (No 2)* (2005, Application no 41138/98 and 643210/01), 98; *Costello-Roberts v. United Kingdom* (1993, 19 EHRR 112); *A v. United Kingdom* (1998, 27 EHRR 611).
[80] *Z and others v. United Kingdom* (2002, 34 EHRR 3), 73.

surviving patient to a severe brain damage, leaving patient in a vegetative state, which in itself could be regarded as inhumane or degrading.

Moreover, while alleged violations of article 3 at the ECtHR have largely derived from particular instances of misconduct, failure to provide prompt and professional medical treatment has also been interpreted by the Court to amount inhumane or degrading treatment.[81] Thus, in relation to EMS situation in which child who is bleeding from a head injury resulting from a sudden fall on the asphalt is forced to wait ambulance may constitute inhumane treatment considering age of the patient, the state of his health and pain he is experiencing while awaiting help. Simultaneously, a highly immobilized elderly person suffering from sudden aggressive viral gastroenteritis could claim a violation of article 3 due to the failure to obtain prompt and professional treatment. However, despite the fact that inhumane or degrading treatment is essentially attached with subjective feelings of individual thereby becoming eligible for an individual claim, violation of article 3 may nevertheless reflect the wider problem of the ineffectiveness of prevailing EMS system. Thus a claim essentially constructed upon individual situation may be expanded to include general claim as well.

2.2.3. ARTICLE 8 SHOULD NOT BE OVERLOOKED

Article 8 – safeguarding the right to respect private and family life – appears to have an equivalent meaning especially in conjunction with article 2 in relations to the health related claims. According to the first paragraph of article, everyone has the right to respect his private and family life, home and correspondence. Similar to articles protecting the freedom of thought, conscience and religion (art. 9), of expression (art. 10) and of assembly (art. 11), the second paragraph of article 8 allows the right to be interfered with public authority only in the predetermined situations listed in the article protecting *inter alia* interests of national security, public safety, economic well-being, health or morals. Additionally, the limitations must be necessary in a democratic society and done in accordance with the law.[82]

The case law of the ECtHR illustrates the extensive scope of article 8 dealing with the questions from sexuality, parental issues to data protection, transgender issues and environmental concerns.[83] In fact, the ECtHR stated in numerous cases

[81] *Hurtado v. Switzerland* (1994, the ECHR 25); *Keenan v. United Kingdom*, *supra* note 56.
[82] *The ECHR*, art. 8(2).
[83] *X and Y v. Netherlands* (1986, 8 EHRR 235); *Dudgeon v. United Kingdom* (1982, 4 EHRR 149); *Johnston v. Ireland* (1987, 9 EHRR 203); *Keegan v. Ireland*, ECtHR (1994, 18 EHRR 342); *M.N. and Others v. San Marino* (2015, Application no. 28005/12); *Khan v. United Kingdom* (2001, 31 EHRR 45); *Christine Goodwin v. United Kingdom* (2002, 35 EHRR 18); *Fadeyeva v. Russia* (2005, The ECHR 376); *Hämäläinen v. Finland* (2014, Application no. 37359/09); *Giacomelli v. Italy* (2007, Application no. 59909/00).

that private life is a broad term not susceptible to exhaustive definition.[84] Thus, anything to do with personal health, physical and psychological integrity, personal autonomy, philosophical, religious or moral beliefs or family and emotional life can be considered to fall under the concept of private life.[85]

As article 8 is widely applied in conjunction with article 2, the distinctive element of article 8 in relation to the right to life derives from the fact that, unlike article 2, the right to private life *de facto* includes the notion of the personal autonomy and physical integrity.[86] For example, in *Glass v. UK* the ECtHR found that the hospital interfered with the personal autonomy under article 8 by giving morphine to a disabled child against the mother's wishes although other means to alleviate the pain were available.[87] In *X v. Finland* the Court held that physical integrity does not cease due because of a diagnosed mental illness.[88] In *Tysiac v. Poland* the Court held that article 8 included the patient's right to be heard while considering her medical treatment.[89] Thus, personal autonomy appears as a valuable principle in relation to EMS as well.

The correct application of personal autonomy requires broad medical understanding from ambulance crew because, as the Court has stated in numerous cases, individuals need to be provided with proper information on health risks.[90] Thus, the decision of patient to decline transportation to medical center or refusal to take pain medication should result from personal evaluation based on information on risks explained by ambulance crew. On the other hand, medical professionals should also know how to evaluate whether applying the right to personal autonomy, such as a patient refusing treatment and transportation despite a headache, would in fact endanger patient's right to life, for example, because of an incipient cerebral hemorrhage.

Furthermore, equivalent to articles 2 and 3, the state is also obliged to take appropriate measures to secure the rights of individuals also under article 8. However, the Court has discussed and acknowledged the balance between state's economic interests and individuals' right to respect private and family life for example in *Hatton and others v. UK* or *Flamenbaum and Others v. France* regarding the proximity of an airport, and in *Lopez Ostra v. Spain* concerning industrial

[84] *Peck v. United Kingdom* (2003, 36 EHRR 4), 1, 57; *Niemietz v. Germany* (1992, 16 EHRR 97), 29.
[85] Lisa Waddington, "Unravelling the Knot: Article 8, Private Life, Positive Duties and Disability: Rewriting Sentges v. Netherlands": 333; in: Eva Brems, ed., *Diversity and European Human Rights: Rewriting judgements of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2013); G. Cohen-Jonathan, "Respect for Private and Family Life": 407; in: McDonald, et al., eds., *The European System for the Protection of Human Rights* (Martinus Nijhoff Dordrecht, 1993).
[86] *Y.F v. Turkey* (2003, the ECHR 391), 33.
[87] *Glass v. United Kingdom (*2004, 39 EHRR 15).
[88] *X v. Finland* (2012, Application no. 34806/04).
[89] *Tysiac v. Poland*, *supra* note 59.
[90] *Brincat and Others v. Malta* (2014, Applications nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11); *Vilnes and Others v. Norway* (2013, application no. 52806/09); *Guerra and others v. Italy* (1998, 26 EHRR 357).

pollution.[91] In a sense, these judgments may be seen to allow state to some extent to justify centralization of ambulance service in densely populated areas where demand is greater than in the rural areas. However, even if the economic interests of the state are fairly balanced against private lives of individuals living where ambulances have been removed, the state is nevertheless under an obligation to ensure effective exercise of articles 2 and 3 of the ECHR. Therefore, application of article 8 is closely linked to the right to life and the prohibition of torture, inhumane or degrading treatment also in the context of arranging emergency health care services.

2.3. CHALLENGES TO LODGING A CLAIM ARISE FROM STRICT ADMISSIBILITY CRITERIA

The broad scope of human rights protected in the ECHR provides various ways of constructing a claim on the right to EMS for lodgment at the ECtHR. Contrary to the original system of the ECHR by which admission to the Court required acceptance from the European Commission of Human Rights, Protocol 11 coming in force in 1998 and merging the Commission into the Court granted direct access to the ECtHR for individuals.[92] However, similar to the admissibility criteria on the CCP under the Charter, the applications to the ECtHR are also subject to particular conditions.

For a start, a claim needs to concern the interpretation and application of the Convention or its Protocols, thereby falling within the jurisdiction of the ECtHR.[93] As a general requirement for admission to the ECtHR is that the application also needs to identify the applicant, all domestic remedies have to be exhausted, the application must be lodged within the required time frame, and the application cannot have already been examined or submitted to another procedure.[94]

As the fulfilment of such criteria seems reasonably easy to meet, successful admission consists of additional requirements as well. Although the right to submit individual application is automatic,[95] article 34 of the ECHR requires that applicant is the victim of a violation by state of the rights set out in the Covenant or its protocols. However, as strict and literal interpretation of the demand would exclude those applications in which the victim is toddler or killed as a result of alleged

[91] *Hatton and others v. United Kingdom* (2003, 37 EHRR 28); *Flamenbaum and Others v. France* (2012, applications nos. 3675/04 and 23264/04); *Lopez Ostra v. Spain* (1994, 20 EHRR 277).
[92] *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby* (1994, CETS No. 155); Alastair Mowbray, *supra* note 48, 12-15.
[93] *The ECHR*, art 32.
[94] *The ECHR*, art. 35(1) and art. 35(2)(b).
[95] J.G. Merrills and A.H. Robertson, *Human Rights in Europe: a Study of European Convention on Human Rights* (Manchester: Manchester University Press, 2001), 202.

misconduct under article 2, under certain circumstances the ECtHR has recognized the right of representatives such as family members to lodge the application against the state.[96] While such exemptions are not in dispute in situations of a deceased person, it could nevertheless also be invoked when a person who is a victim of the violation is unable to submit the claim himself. Thus, the application submitted by the family members of a patient who suffered a brain damage due to misapplied resuscitation cannot be rejected solely on the principle of victimology under article 34 of the ECHR.

Furthermore, in addition to the eligibility of single person, an application can also be submitted by NGO or group of individuals.[97] Whereas a group of individuals is relatively easy to identify, the essential challenge focuses on the question of what constitutes an NGO. On some occasions, legal persons have been recognized as falling within this scope.[98] Thus, a private ambulance company may, for example, successfully claim violation of the freedom of expression when company is prevented from publishing research results contradicting the validity of commonly applied guidelines provided to cardiac arrest. On the other hand, public organs exercising public functions cannot be regarded as NGOs.[99] Therefore, it follows that organs such as hospital districts or municipalities responsible for providing EMS are ineligible to enforce their rights against state at the ECtHR.

Moreover, the fact that article 34 of the ECHR requiring that applicant, whether individual, NGO or group of individuals, be a victim of a violation would indicate that the application must relate to the damage that has already occurred. Nevertheless, even in the 1980s the Court has accepted that under certain conditions an individual may claim to be a victim of a violation because of the mere existence of a law.[100] Considering EMS as a specific sub-category of health care responding to urgent medical situations, in real life not every individual evidently needs to enjoy the right to EMS to ensure the right to life. However, the fact that an individual does not need to invoke the right to EMS does not preclude the state's obligation to provide EMS system in such a manner that it *de facto* safeguards everyone's right to life. Therefore, the mere existence of discriminatory legislation or EMS guidelines, for example, prohibiting public safety dispatcher from sending ambulance to social health care facilities could be challenged as violating article 2 of the ECHR together with article 14 or protocol 12 prohibiting discrimination.

[96] *Gard and Others*, *supra* note 56; *Centre for Legal Resources on behalf of Malacu and Others v. Romania* (2016, Application no. 55093/09).
[97] *The ECHR*, art. 34.
[98] *Krone Verlag GmbH & Co KGv. Austria* (2003, 36 EHRR 57); *Vereinigung Democratisher Soldaten Osterreichs and Gubi v. Austria* (1995, 20 EHRR 56).
[99] *Danderyds Kommun v. Sweden* (2001, application no 52559/99); *Ayuntamiento De Mula v. Spain* (2001, application no 55346/00).
[100] See, for example, *Klass v. Germany* (1979-1980, 2 EHRR 214); *Norris v. Ireland* (1988, 13 EHRR 186); *Dudgeon v. United Kingdom*, *supra* note 83.

However, despite the ECtHR accepting that under certain circumstances violations occur because of the mere existence of law, article 35(3)(b) of the ECHR nevertheless requires that applicant have suffered a significant disadvantage. This admissibility criterion introduced by Protocol 14 in 2004 was designed to maintain and improve efficiency and to ease the ECtHR workload allowing the Court to concentrate on more severe violations and disregard applications considered as *de minimis*.[101] It might therefore appear that the mere bruises caused by rough examination of a patient by a paramedic may not be admissible before the ECtHR despite treatment being regarded as degrading and violating article 3 of the ECHR. However, as the consideration of whether the applicant's suffering amounts to a significant disadvantage is evaluated on a case-by-case basis,[102] the ECtHR has also accepted applications where significant disadvantage has not been found but the case was regarded as being of general interest.[103] Thus, an application concerning the failure of ambulance to respond within medically reasonable time and therefore caused a loss of life may seem successful when application is expanded to involve general interests and have potential to endanger the enjoyment of the right to life in more broadly as well. Therefore, despite recognizing the novel reasoning behind the principle of 'significant disadvantage', it can nevertheless be perceived as to some extent hindering the legal certainty of admissibility to the Court as the exhaustive definition of what constitutes significant disadvantage is not, cannot and indeed should not be established. It follows that the lack of specific definition allows variety of cases yet to be submitted, and the success of application depends on the violation in question and on the validity of the arguments.

In conclusion, the admissibility criteria established in articles 34 and 35 of the ECHR are relatively detailed but somewhat controversial. The most challenging aspects of lodging application relate to the questions of how the notion of a 'victim' is defined, what type of violation is claimed and whether applicant has suffered significant disadvantage caused by the violation. Individual claim alleging violation of rights resulting from incident which has already occurred, such as loss of life under article 2 or violation of personal autonomy covered by article 8 resulting from misconduct by paramedics, might be easily lodged, although it seems questionable whether such individual events are regarded as causing significant disadvantage to

[101] *Protocol no 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention* (2004, CETS No. 194); European Court of Human Rights, *Research Report: The New Admissibility Criterion under Article 35 § 3 (b) of the Convention: The Case-law Principles two Years on* (Council of Europe/the European Court of Human Rights, 2012), 4-5.
[102] *Ibid.*, 8.
[103] *Zivic v. Serbia*, ECtHR (2011, application no 37204/08); *Karelin v Russia* (2016, Application no 926/08); *Hebat Aslan and Firas Aslan v Turkey* (2014, application no 15048/09); see also Janneke H. Gerards and Lize R. Glas, "Access to justice in the European Convention on Human Rights system," *Netherlands Quarterly of Human Rights* 35 (2017).

applicant. On the other hand, general claims challenging the overall effectiveness of EMS system could succeed as they have general interest and may affect to numerous individuals. However, to combine a general claim with an individual one alleging that the violation of the rights of one individual resulted from the ineffectiveness of EMS system in general would in fact provide the best grounds for successful application.

3. PROTECTION PROVIDED BY THE CHARTER IS NOT INFERIOR TO THE ECTHR

Despite the fact that the Charter and the ECHR have been designed to complement each other, the ECHR, protecting civil and political rights, has widely been perceived as prevailing over the protection of socio-economic rights thereby, for its part, invoking the differences among the two types of human right categories.[104] Nevertheless, as a result of the evolution and enhancement of the protection mechanisms under both legal documents, the claim that the ECHR offers superior protection to the Charter does not seem indisputable.

3.1. BOTH MECHANISMS SHARE SOME SIMILARITIES

Considering the longer existence of the ECtHR in comparison to the CCP established in the late 1990s, consistent case law and comprehensive jurisprudence emerging over the decades have evidently strengthened the importance of the Court.[105] However, the collective complaint procedure should not be regarded as uninfluenced by the significance of the ECtHR. In fact, decisions provided by both enforcement instances are constructed upon equivalent principles.

Despite the differences between civil and political rights and socio-economic ones, the famous ECtHR doctrine of margin of appreciation allowing states to determine the limits of their own social norms, morals and security can be found *inter alia* also from *ERRC v. Bulgaria* in which the Committee recognized similar principle applied to state's right to determine the steps to be taken to ensure compliance with the Charter.[106] Both enforcement systems would therefore allow state to have broad consideration of how EMS system as such is organized, providing that arrangement does not violate the rights protected in the ECHR or the

[104] Krzysztof Drzewicki, "European System for the Promotion and Protection of Human Rights": 403-404; in: Catarina Krause and Martin Scheinin, eds., *International Protection of Human Rights: A Textbook* (Turku: Academy University Institute for Human Rights, 2012); Oliver De Shutter, *supra* note 18: 463.
[105] Rhona K. M. Smith, *International Human Rights* (New York: Oxford University Press, 2007), 106.
[106] *European Roma Rights Center (ERRC) v. Bulgaria* (2005, complaint no 31/2005), 35; margin of Appreciation has been referred to in numerous ECtHR judgments but one of the most famous one is *Handyside v. United Kingdom* (1976, 1 EHRR 737).

Charter. Simultaneously, as the Committee has regarded the Charter as a human rights instrument with an aim and purpose, the ECtHR has acknowledged that the ECHR is a living document being subjected to the changes.[107] It thus follows that although no application claiming non-compliance or violation of the right to EMS has been lodged yet, such a claim is not excluded from the scope of the Charter or the ECHR as both documents have been designed to adopt a relatively flexible approach to the protection of human rights. Furthermore, while both enforcement mechanisms based their decisions on a case-by-case evaluation, discrimination without objective justification is not accepted by either of them.[108] Therefore, one protection mechanism should not prevail simply because of claim would involve discriminatory aspects.

Furthermore, as the Charter and the ECHR together have been drafted to enhance and safeguard the ideas and principles of the CoE in respect to human rights as well as fundamental freedoms and the rule of law in a democratic society, the enforcement mechanisms also reflect the inherent principle of a fair trial requiring impartiality and independence as well as allowing the parties to be heard in the process.[109] Furthermore, transparency is enhanced because of final reports of the Committee and judgements of the Court are made public.[110] While nowadays the fair trial principle has more or less been taken for granted in democratic societies, impartial, transparent and prompt enforcement procedures increase people's trust towards the human rights protection. Similarly, transparent processes and public judgments contain the responses also from state party of the proceedings, and reflect state's inherent perceptions and attitudes on human rights. The question is thus not only on the internal human rights situation and alleged violations of one state but the process can also have wider effect to state's reputation in the international arena. It may follow that mere participation in the process may invoke state to improve its human rights situation in order to guarantee its own self-interests,[111] such as maintenance of international relations with other states or pleasing public prior to elections.

However, while the fundamental principles of the protection mechanisms in the Charter and the ECHR are equivalent and thus indicate that similar level of protection could be obtained in relation to the right to EMS, there is nevertheless

[107] *ICJ v. Portugal* (1999, complaint no 1/1998), 32; *Selmouni v. France*, *supra* note 77.
[108] *European Federation of Employees in Public Service v. France* (2000, complaint no 2/1999), 31-32; the ECtHR has emphasized the concept, especially in relation to the cases concerning the margin of appreciation, such as *Handyside v. UK*, *supra* note 106, or discrimination cases such as *Thlimmenos v. Greece* (2000, application no 34369/97); *IAAE v. France* (2003, complaint no 13/2002); *Belgian Linguistic Case (No 2)* (1968, 1 EHRR 252).
[109] *The ECHR*, art 21(3); *European Social Charter (revised)*, Part IV, art. 25(4).
[110] *European Social Charter (revised)*, art. 8(2); *The ECHR*, art. 44(3), 45.
[111] Carl Schmitt, *the Concept of the Political* [1929] (Chicago: University of Chicago Press, 2007), 19-32.

divergences between the systems. Such differences can include the capability to hinder the effectiveness of the protection.

3.2. DIFFERENCES BETWEEN THE PROTECTIONS STILL REFLECT THE PREVAILING CATEGORIZATION

In essence, the inequalities of the protection mechanisms, such as admissibility criteria and binding force of judgements, reflect the diverse natures of civil and political human rights in comparison to socio-economic ones. The first-mentioned are characteristically designed to provide protection to each individual in their particular situations, whereas the latter generally affects to wider population, thereby requiring complaints to be submitted by the organizations.

As described above, the right to EMS can be enforced equivalently under the Charter and the ECHR. However, the ECtHR admissibility criteria seem much stricter than the criteria on the CCP, as in the latter the submission of complaint is not dependent on exhaustion of domestic remedies nor contains specific time limits. This would make admission to the procedure significantly quicker than the ECtHR where access generally takes years because of the time-consuming processes in the national courts. Presumably the requirement for a specific time-limit and execution of domestic remedies seems dispensable as the purpose of the CCP is to challenge state's non-compliance with particular provision of the Charter, non-compliance thus continuing and the provisions not being implemented properly in the domestic law or at all.[112] Understandably, individual filing (or considering filing) claim in human rights enforcement body wishes prompt proceeding. In a wider perspective, alleged violations should in fact be investigated and decisions issued quickly in order to remedial measures to be initiated and further human rights violations prevented.

Furthermore, unlike the ECtHR where manifestly ill-founded application is declared inadmissible,[113] interestingly enough collective complaints are not rejected despite having no factual basis. Thus, claim that paramedics caused the death of patient by failing to recognize the symptoms of stroke while examining patient for stomach flu two months prior to the cerebrovascular accident occurring would not be accepted by the ECtHR towing to the lack of medical evidence on a probable causal relation.[114] However, constructing a claim to show the state's non-

[112] Robin R. Churchill and Urfan Khaliq, *supra* note 43: 433-434.
[113] *The ECHR*, art 35(3)(a).
[114] Common symptoms of a cerebrovascular accident such as hemiplegia, speech dysfunction, visual dysfunctions and dizziness appear suddenly and cannot be recognized weeks prior to the stroke; see, for example, S. E. Andrade, et al., "A systematic review of validated methods for identifying cerebrovascular accident or transient ischemic attack using administrative data," *Pharmathe Coepidemiology and Drug Safety* 21 (2012): 100.

compliance with articles 11(1) and 13(3) of the Charter by not providing proper training for ambulance crew to recognize strokes could be accepted as collective complaint despite the ill-founded example.

The binding force of final judgements imposes another substantial difference between the two enforcement mechanisms. One of the most remarkable aspects of the ECtHR being regarded almost as a constitutional tribunal arises because the Court's judgement is final and state who is a party to case undertakes to abide it,[115] and refusal to comply may provoke new ECtHR case.[116] However, resolutions resulting from the CCP are non-binding recommendations addressed to state concerned,[117] which essentially appears to weaken the protection of the Charter in comparison to the legally binding judgements of the ECtHR. On the other hand, despite the non-binding nature of resolutions, states cannot simply disregard the findings of the Committee but are in fact obliged to recognize results and adopt the measures necessary to comply with the Charter as well as to provide information on the measures adopted.[118] Thus, similarly to the supervision on the execution of the ECtHR judgements, the compliance with resolutions of CCP is also monitored while providing state with some autonomy in choosing the means to fulfil those obligations.

Furthermore, participation in process in the CCP as well as in the ECtHR under the fair trial principle requires that the state thoroughly evaluate its conduct and compliance with the human rights instrument in question. In the best case, proceeding concerning specific event such as the loss of life under article 2 of the ECHR due to the failure of ambulance to reach patient within a medically reasonable time would also result in changes in a wider perspective as state by itself analyses the overall effectiveness of EMS system in general. Simultaneously, evaluation of the non-compliance with the article 11(1) and 13(3) of the Charter due to some appointed failures in EMS, such as delayed response times or unprofessional ambulance crew, would also provoke state to assess the functionality of other health care sectors. The differentiating element, however, derives from the fact that whereas admission to the ECtHR requires applicant to be a victim of a violation, the CCP claiming unsatisfactory application of the Charter provisions can be invoked without anyone having to suffer an injury. Thus, the enforcement procedure of the Charter provides a better mechanism for the preventative protection of the rights.

[115] *The ECHR*, art 46(1).
[116] *The ECHR*, art. 46(4).
[117] *CCP Protocol*, art 9(1)
[118] *Ibid*, art. 10.

3.3. LODGING THE CLAIM SIMULTANEOUSLY IN BOTH ENFORCEMENT MECHANISMS IS ALSO POSSIBLE

Whereas the CCP offers prompt admission unconcerned with exhaustion of domestic remedies, the nature and scope of the Charter hinders protection as states are allowed to designate the provisions to be bound on. Simultaneously, being codified into the separate legal document application of the CCP is dependent on state's willingness to adopt such an enforcement mechanism. Therefore, considering the comprehensive list of states ratified the ECHR and acknowledging the jurisdiction of the ECtHR, admission to the Court is available in practically every European and former Soviet state. On the other hand, the strict admissibility criteria impair access to the Court.

Furthermore, even though the ECtHR was originally designed to provide protection for individuals against the violation of their rights, the increasingly enormous workload over the years has forced the Court to enhance its system.[119] Tightened admissibility criteria introduced by Protocol 14, including the notion of 'significant disadvantage', have directed the Court to the point where admissible cases are nowadays more likely to involve a wider significance either for individual or public in general. While this trend increases the efficiency of the Court and provides broader protection to individuals, the enhancements of the ECtHR reduce the possibilities for individuals to apply to the Court. Therefore, despite the advantages and disadvantages of the protection mechanisms of both the ECtHR and the Charter, it remains impossible to unequivocally pronounce that one system would provide superior protection of the right to EMS.

It should be noted that the CCP does not exclude a claim of submission to another international investigation procedure. While such applications are declared inadmissible to the ECtHR,[120] thereby safeguarding the Court's autonomy to decide cases without influence of another international body, the protection of the right to EMS could be sought initially from the Court and, after receiving judgement, claim can be submitted to the CCP. Moreover, article 35(2)(b) of the ECHR essentially declares inadmissible only those cases which have been submitted to another international investigation by same person(s) and both complaints contain identical facts without relevant new information.[121] Thus, while the application was held inadmissible in *Martin and 22 others v. Spain* or in *Poa and others v. UK,* because of the applications' collective nature concerning *inter alia* working conditions, in

[119] Philip Leach, Helen Hardman, et al., *Responding to Systemic Human Rights Violations: An Analysis of 'Pilot Judgements' of the European Court of Human Rights and their Impact at National Level* (Antwerp – Oxford – Portland: Intersentia, 2012), 9.
[120] *The ECHR*, art 35(2)(b).
[121] William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), 774.

Folgero and others v. Norway admission to the ECtHR was permitted, although the claim concerning the same factual basis was also submitted to the UN Human Rights Committee but by different applicants.[122] Therefore, the rule established in article 35(2)(b) is inapplicable *inter alia* when applicants are not same persons or application is lodged by NGO without authorization of the victim.[123]

As complaints to the Committee are lodged by NGOs whereas admission to the ECtHR requires application from the victim of the violation it follows from the case law of the ECtHR and of article 35(2)(b) of the ECHR, that the protection of the right to EMS can *de facto* be sought from both ECtHR and the Committee simultaneously. Furthermore, whereas the Charter provides protection for the population generally, allowing claims concerning *inter alia* the state's failure to provide sufficient number of ambulances, the ECHR would require the violation of article 2 even though the violation had occurred due to the lack of ambulances available to respond to individual situation. Since successfully admissible application to the ECtHR requires individual component, despite claims essentially challenging the overall ineffectiveness of EMS system, application and the collective complaint cannot be regarded as identical, which in fact makes the enforcement of the right to EMS applicable in both protection systems simultaneously.

CONCLUSION

Emergency medical service (EMS) is a special branch of the health care system designed to respond to situation in which urgent treatment is needed for injury or a sudden onset of illness. While the right to health care has traditionally been considered as socio-economic right inferior to the first generation human rights, because of its inherent nature of safeguarding the right to life, EMS balances between both human rights categories.

The Council of Europe (CoE) is indisputably a forerunner in the global human rights regime in adopting the European Convention of Human Rights (ECHR) already in 1950 and the Social Charter in 1961. The conventional viewpoint separating civil and political rights from socio-economic ones and stressing the significance of the first category was upheld for decades by the ineffective enforcement mechanism under the Charter providing individuals practically no measures to enforce their social and economic rights. Fortunately, the importance of socio-economic rights was realized in 1990s and measures dedicated to strengthening the protection of those rights provided in the Charter were adopted.

[122] *Martin and 22 others v. Spain* (1992, 73 DR 120); *Poa and Others v. the United Kingdom* (2013, application no 59253/11); *Folgero and others v. Norway* (2006, application no 15427/02).
[123] *Celniku v. Greece,* (2007, application no 21449/04), 39-40; *Smirnova and Smirnova v. Russia,* (2002, application no 46133/99 and 48183/99); *Folgero and others v. Norway*, *supra* note 122.

While no case directly concerning the right to EMS has yet been decided by the European Court of Human Rights (ECtHR), individual claims concerning failure to provide proper medical care under article 3 of the ECHR as well as violations of personal autonomy in relation to medical treatment according to article 8 have already been successfully challenged. Furthermore, the case law from the ECtHR nevertheless invokes state's obligation to guarantee a functioning EMS system in more broadly perspective as well. The state having a positive obligation of securing the right to life by maintaining proper police forces to prevent the deprivation of life should not differ from the demand to guarantee prompt and professional medical response in life-threatening medical situations.

Conversely, cases that are enforceable under both human rights instruments of the CoE, such as the right to EMS, challenge the traditional thinking about human rights categories. As a general claim alleging the unsatisfactory application of Charter article 11(1) protecting the right to health and article 13(3) ensuring the effective exercise of the right to medical assistance can be lodged easily under the collective complaint procedure, the violation of articles 2, 3 and 8 of the ECHR provide good grounds for individual claim to be submitted to the ECtHR.

The difference between the two enforcement mechanisms derives from the fact that whereas the protection of the right to EMS under the Charter can be invoked to challenge the ineffectiveness of prevailing EMS system without actual incident, successful application in the ECtHR requires individual involvement by which a particular right has already been violated and damage occurred. Although the ECtHR would declare inadmissible cases that have already been subjected to investigation of another international procedure, because of diverging natures of the collective complaint procedure and protection provided by ECtHR, the claim arguing the failure of EMS system to amount a violation can *de facto* be lodged simultaneously in both human rights enforcement systems, with a different emphasis and by different applicants.

Furthermore, in comparison to the ECtHR, the less detailed admissibility criteria of the collective complaint procedure excluding, for example, the requirement of exhaustion of domestic remedies as well as specific time frame certainly increases promptitude and attraction to enforcing the right to EMS under the Charter. However, the inherent weaknesses of protecting the right to EMS under the Charter are related to state's privilege of designating binding articles of the Charter as well as the collective complaint procedure being codified in the additional protocol.

Iin comparison to the CCP Protocol, the large number of ratifications in relation to the ECHR as well as the codification of the ECtHR in the Convention

unquestionably increase the importance of the document and, for its part, reflect the still prevailing understanding of civil and political rights as superior to socio-economic rights. However, the measures taken to enhance protection under the Charter as well as the expansion of the interpretations of the ECHR articles by the ECtHR means that the conventional perception of the hierarchy of human rights categories is decreasing, making it (hopefully) easier for the right to EMS to be enforced in both of the enforcement mechanisms.

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